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In The

Supreme Court of the United States

October Term, 1989

CLYDE OSBORNE,

Appellant,

vs.

STATE OF OHIO,

Appellee.

On Writ Of Certiorari To
The Supreme Court Of Ohio

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF THE APPELLEE.

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INTEREST OF AMICUS CURIAE

Consent

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of Appellant, Osborne, was received from his attorney, Ms. S. Adele Shank, Esq., and of Appellee, State of Ohio, from its attorney, Mr. Ronald J. O'Brien, Esq. A copy of these letters of consent have been filed with the Clerk of the Supreme Court.

American Family Association's Interest

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under its original name of National Federation for Decency,

Inc. AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, AFA has members in all 50 states; over 520 chapters of local citizens who are active in efforts to protect children from pornography and sexual exploitation; and over 370,000 subscribers to its monthly newsletter, AFA Journal. Amicus also offers professional assistance to legislatures and law enforcement officers who wish to address the problems of child sexual exploitation through child pornography.

The ability of a state to protect the welfare of all its citizens, including the children, is vital to the efforts of the AFA membership. American

Family Association, Inc., seeks to promote a healthful environment for all Americans and it recognizes the need to afford children the maximum protection from sexual exploitation. The position of the American Family Association, Inc., will support the interest of the State of Ohio to uphold the authority to proscribe the possession of child pornography.

SUMMARY OF ARGUMENT

I. POSSESSION OF CHILD PORNOGRAPHY IS DIRECTLY RELATED TO THE SEXUAL ABUSE OF OTHER CHILDREN AND THE CONTINUED HARM TO THE CHILD DEPICTED

Child Pornography is the permanent record of the sexual abuse of a child. It serves to entice other children into acts of sexual abuse and is used to silence children who were victimized by the acts.

The existence of child pornography compounds the victimization associated with sexual abuse. It creates additional anxieties in a child and leaves a legacy that is difficult, if not impossible, for children to overcome.

II. THE PROHIBITION AGAINST POSSESSION OF CHILD PORNOGRAPHY ENACTED BY THE STATE OF OHIO DOES NOT VIOLATE THE PRIVACY RIGHT RECOGNIZED IN STANLEY V GEORGIA

The privacy interests involved in Stanley are not comparable to those involved in the present case. The Court must balance the privacy interests of the child involved in the depiction with those of the individual who possesses the material.

Clearly, the State has a compelling interest in safeguarding its children from further harm through the existence

of the depictions. The prohibition against the possession of child pornography is a reasonable response to the problem of sexual exploitation of children through child pornography.

LAW AND ARGUMENT

I. THE POSSESSION OF CHILD PORNOGRAPHY IS DIRECTLY RELATED TO THE SEXUAL ABUSE OF OTHER CHILDREN AND THE CONTINUED HARM TO THE CHILD DEPICTED

A. Possession of Child Pornography is an Integral Link in the Cycle of Sexual Abuse of Children

The sexual exploitation of children through the use of child pornography has been identified as a series of exploitations with a common thread. These segments of exploitation include the production of the visual depiction, the circulation of the visual depiction, the use of the visual depiction to hold captive the victim, and the use of the

visual depiction to seduce and instruct other victims.

Initially, the child who is photographed or filmed is molested. "There is only one way to make child pornography, and that is, you must sexually molest a child. It is a photograph, a slide, a picture of a crime in progress. There is no debate about it." K.V. Lanning, Child Molesters: A Behavioral Analysis 35 (2d ed. 1987 National Center for Missing & Exploited Children). Child pornography is nothing more than the permanent record of the victimization and sexual abuse of the child. Final Report of the Attorney General's Commission on Pornography 650 (1986) [hereinafter cited as Final Report]. Therefore, in order to create the visual depiction the child must be

sexually exploited. Child pornography simply memorialized the abuse and perpetuates the trauma of the abuse. New York v Ferber, 458 U.S. 747, 759 (1982).

Second, experts have identified the child's peculiar cognizance of the permanence of the photograph and film and the circulation of such photographs compounds the victimization the child has suffered. 458 U.S. at 759. Consequently, the mere existence of the depictions is a continuation of the abuse of the child.

Third, the visual depiction of a child is used to blackmail the child and buy his or her continued silence about the sexual abuse. K. Lanning, Collectors, in Child Pornography and Sex Rings 86 (A. Wolbert Burgess ed. 1984). The depictions are held as threats to

insure the child's cooperation and compliance in future exploitation.

Finally, the depictions are used to seduce and instruct other victims. "A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." Collectors at 86. This use of child pornography may have the most directly harmful impact on the greatest number of children. Child pornography becomes an instrument for the abuse and exploitation of other children. Several cases involving the sexual abuse of children have identified the use of

child pornography in the abuse process. [1]

1/ See, e.g., In re R.G., 518 N.E.2d 691 (Ill. App. 1988) ("When R.G. saw a movie with his mother in which a boy was licking a dog's penis and playing with the dog, R.G. stated he did not believe that could happen, and his mother sat their dog on the bed and told R.G. to take down his pants and the dog would lick his penis." 518 N.E.2d at 694); Moberg v State, 770 S.W.2d 930 (Tex. App. 1989) (upon search after arrest for aggravated sexual assault the officers discovered "Moberg's ice chest, clothes, and clothes basket, which contained the polaroid photographs depicting female children performing acts of sex on the private parts of an unidentified male." 770 S.W.2d at 933); Zimmerman v State, 552 A.2d 47 (Md. App. 1989) ("Execution of the warrant revealed photographs of men and boys in various poses displaying their genitalia. The photographs were shown to Zimmerman's ex-wife, who readily identified two of the boys in the pictures as her nephews. The nephews were contacted and, because of what both they and Zimmerman's ex-wife recounted, Zimmerman was arrested and charged with the sexual offenses of which he was convicted." 552 A.2d at 48-49.)

The harm to children used during the creation of child pornography is obvious and substantial. These harms include the risk of physical injury due to abuse of immature organs, infectious disease, and an identifiable probability that the abused child will repeat the cycle of abuse as an adult. 2/

At each stage of the cycle, possession of child pornography is an integral part of the sexual exploitation of the child. In upholding the New York state statute regulating child pornography, this Court in Ferber recognized the harm of the visual depictions. 458 U.S. at 758.

2/ See, Final Report at 626.

B. The State of Ohio Has a Legitimate Governmental Interest in Prohibiting the Possession of Child Pornography

Based upon the recognized harm to the "psychological, emotional, and mental health of the child" the State of Ohio has enacted legislation which is designed to protect children from such harm. It is well settled that the State may prevent the exploitation of children in various forms or activities. The protection from sexual exploitation is an interest that is no less significant.

The Ohio Supreme Court previously addressed the State's interests in enacting the prohibition against possessing child pornography and found that "Ohio's General Assembly has determined that it is necessary to prohibit possession of such materials in order to halt sexual exploitation of

children." State v Meadows, 28 Ohio St. 3d 43, 51, 503 N.E.2d 697, 704 (1986), cert. denied, 480 U.S. 936 (1987). In upholding the prohibition the court stated that "Ohio's compelling state interests of preserving its children's privacy and protecting them from the cruel psychological, mental, and emotional abuse caused by sexual seduction, exploitation, and mistreatment occasioned by child pornography, outweigh appellee's interest in possessing such visual depictions." 28 Ohio St. 3d at 52.

The Ohio Supreme Court in the present case, State v Young, 37 Ohio St. 3d 249, 256-57, 525 N.E.2d 1363, 1372 (1988), stated:

> The First Amendment must remain inviolate. We do not compromise that statement when we find that obscenity is not

> protected by the First Amendment. * * *. Likewise, child pornography also is not, and should not be, protected. The state has a compelling interest in the protection of children. Reasonable laws prohibiting the exploitation of children may be passed by the General Assembly to insure that interest.

A State may protect its children through the regulation of a variety of activities including purchase of alcoholic beverages, [3] maximum work day hours, [4] participation in sexually

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3/ See, R.C. §§4301.63 and 4301.632 (Page's Supp. 1988).

4/ See, United States v Darby, 312 U.S. 100 (1941).

explicit performances, [5] and exposure to sexually explicit material. [6]

These laws are all designed to protect children from some identifiable harm. So too, is the prohibition against possession of child pornography. The harms associated with the possession are no less real to the children who have been or may be victimized by its existence. Neither are the harms less severe because the abuse has been captured on film for posterity.

Recently, this Court addressed the Congressional attempt to protect children from exposure to sexually explicit

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5/ See, New York v Ferber, 458 U.S. 747 (1982).

6/ See, Ginsberg v New York, 390 U.S. 629 (1968).

telephone messages. In Sable Communications of California v Federal Communications Commission, 109 S.Ct. 2829 (1989), this Court concluded that the government had a legitimate interest in protecting children from non-obscene material. "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." 109 S.Ct. at 2836.

Protection for children from sexually explicit messages is a legitimate and compelling governmental interest. In the same manner protecting children from the perpetual and repeated victimization occasioned by the existence

and possession of child pornography is equally compelling.

Finally, the intrusion into the individual's home is warranted by the nature of the child pornography distribution system. Child pornography generally originates in the home and may remain in that home or it may be transferred to the home of another individual. In any event, the nature of the distribution system does not generally involve the public marketplace. Consequently, the activities of the child pornography distributors have, in essence, turned their private homes into marketplaces for purposes of child pornography dissemination. Therefore, the prohibition of the possession of child pornography which may seem overly-intrusive in the context of a general

marketplace distribution scheme is not so because of the clandestine nature of child pornography trafficking.

II. THE PROHIBITION AGAINST POSSESSION OF CHILD PORNOGRAPHY ENACTED BY THE STATE OF OHIO DOES NOT VIOLATE THE PRIVACY RIGHT RECOGNIZED IN STANLEY V GEORGIA

A. The Nature of Child Pornography Supports Such a Prohibition

The Court in Stanley v Georgia, 394 U.S. 557, 568 (1969), held "that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." In reaching this conclusion the Court discussed the assertion that exposure to obscene materials may lead to deviant sexual behavior. The Court found that such allegations were not adequately supported. In addition, the Court found that assertions that the prohibition

against private possession was not justified on the basis that such action was necessary to address the problem of distribution.

The very nature of child pornography creates a need to reach a different conclusion using the rationale of the Stanley Court. First, as noted earlier, there is significant evidence that exposure to child pornography leads to anti-social or deviant behavior. By virtue of the fact that those who choose to view child pornography are, in essence, participating in the victimization of the child.

Private possession of child pornography comes about in one of two ways: it was created by the possessor; or it was disseminated to the possessor by the creator or third party. If the

possessor is the creator of the depiction then he was an active and physical participant in the sexual abuse of the child. If the possessor obtained the depictions from some other person, then he is participating in the perpetuation of the abuse of the child depicted. In either case, private possession is not an isolated activity. The nature of child pornography is such that the visual depiction which resulted from the abuse serves as a continual source of abuse to the victim.

Second, the Stanley Court found no evidence that would justify prohibition of private possession as a means of attacking the distribution of obscene material. The nature of child pornography and its distribution network are such that this action on the part of

the State of Ohio is reasonable. Unlike obscene material, child pornography is traded and sold in a clandestine manner. The covert nature of child pornography presents unique challenges for a State wishing to afford its children full protection from the harms of such material.

There have been significant attributes identified with respect to the acquisition and collection of child pornography. 7/ In addition, there is

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7/ "The pornographic materials themselves provide a method of recording and remembering the children, a stimulus to sexual arousal, an instructive guide for new children, an item of exchange and a focus of communication among other collectors, and a source of revenue. In addition, there are strong indications that the pictures allow the collector a connection with earlier traumatic experiences when he himself was

(Footnote Continued)

significant evidence that individuals who are consumers of child pornography collect such depictions and continually seek to expand this collection. 8/

(Footnote Continued)
victimized. Rather than confronting the victimization, the collector preserves psychological integrity by producing pornographic material that attempts to justify and normalize the abuse while safeguarding aggressive and libidinal drives. The pornography becomes the confirming evidence against the argument that child exploitation and molestation is not harmful and is justified because the child has aggressive and sexual drives. Pornography endorses the belief patterns that ultimately justify violence toward children. First, there is the precarious belief of the child victim that pornography and exploitation are wrong. This changes to a belief that it is acceptable and that the child is responsible for the sexual activity." C. Hartman, A.W. Burgess and K.V. Lanning, Typology of Collectors, in Child Pornography and Sex Rings 107-08 (A. Wolbert ed. 1984).

8/ See, K. Lanning, Collectors, in Child Pornography and Sex Rings 84-86 (A. Wolbert Burgess ed. 1984). Mr. Lanning
(Footnote Continued)

Finally, as the Court in Ferber noted, "[t]he value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis." 458 U.S. at 762. Of the established uses of child pornography none is, to any degree, beneficial to society.

B. The Nature of the Privacy Interests Involved in the Possession of Child Pornography

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(Footnote Continued)
identifies several reasons why pedophiles maintain the child pornography collection. This includes the need to "satisfy, deal with, or reinforce compulsive, persistent sexual fantasies about children"; "understand and justify their behavior"; have "camaraderie and additional behavior validation"; and keep the child at a constant age because "no matter how attractive any one child sexual partner is, there can be no long-term sexual relationship. All child victims will grow up and become sexually unattractive to the pedophile."

There are two primary interests involved in the private possession of child pornography: those of the possessor and those of the child depicted. In Stanley, the Court discussed the privacy interests of an individual to possess obscene material. The Court stated, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 394 U.S. at 565.

The Court's conclusion in Stanley is inapplicable to the prohibition against the private possession of child pornography for two primary reasons. First, as discussed above, the nature of

child pornography presents evils that were unsubstantiated with respect to the possession of obscene material. In United States v Andersson, 803 F.2d 903, 907 n.3 (7th Cir. 1986), the court noted:

> It is not clear to this Court that Andersson possesses such a right. Stanley held that the state may not proscribe possession of obscenity in the privacy of the home. According to Stanley, the State's interest in regulating obscenity (generally protecting the unwilling viewer and public morals), ended at the door of the private home. But the State's interests in regulating child pornography are radically different than those in regulating obscenity. The State's primary concern is protecting the child participants from that type of sexual abuse. The harm inflicted on these children is two-fold. First is the sexual abuse when the film or photograph is initially produced but that harm continues when these photographs and films are distributed. Ferber, 458 U.S. at 759, 102 S.Ct. at 3355; Shouvlin, Preventing the Sexual

> Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981) ("A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.") Drying up the market may be the only way to effectively combat the production. Ferber, 458 U.S. at 760, 102 S.Ct. at 3356. Therefore, the State's interests in regulating pedophilic pornography may well extend into the private home.

Therefore, the underlying analysis used by the Court in Stanley is fallacious in the present situation.

Second, the rationale supporting the State's prohibition against possession of child pornography is not associated with an attempt to control a person's mind. The interests supporting the State's actions are solely related to the need to protect its children from harms associated with the existence of child pornography. Individuals may think and

fantasize about sexual activity with children, the State has merely prohibited the further exploitation of actual children for such purposes.

The second privacy interest involved is that of the child in the depiction. Each depiction represents the sexual abuse of a child. When the abuser retains the photograph or when the depiction is held by someone else the privacy interests of the child are significantly affected.

It is the attempt to protect the children who have been exploited by the sexual abuse from further exploitation through the consumption of child pornography. So long as the depictions of the abuse are in existence, the child depicted suffers additional anxiety and harm. To effectively safeguard the

child's interests the State's action in prohibiting the possession of such depictions is a reasonable and necessary step. 9/

9/ "Although harms to performers involved would not otherwise be taken to be sufficient condition for restriction of the photographs rather than the underlying conduct, the situation with children is of a different order of magnitude. The harm is virtually unanimously considered to be extraordinarily serious, and the possibility of consent is something that the law has long considered, and properly so, to be an impossibility. As a result, forms of deterrence of the underlying conduct that might not otherwise be considered advisable may be considered so with respect to photographs of children. If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures.

As part of the previous justification, it ought to be obvious that virtually all child pornography is produced surreptitiously, and thus, even with vigorous enforcement efforts,

(Footnote Continued)

The analysis of the possession statute requires a balancing of the privacy interest of the child, the interests of the State in protecting the child and whatever privacy interests an individual may have in possessing child pornography. It is clear that the interests of the State in protecting children from the harms associated with the existence of child pornography and the child's privacy rights clearly outweigh any privacy interest an individual may have in possessing child pornography.

III. CONCLUSION

(Footnote Continued)
enforcement will be difficult." Final Report at 412-13.

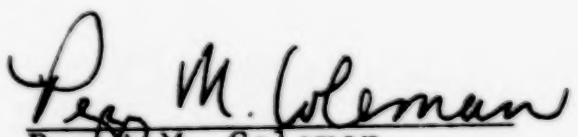
This Court has the opportunity to clearly articulate that a state may regulate the possession of child pornography in an effort to protect its children from the harms associated with such depictions. In doing so, this Court would recognize the well-established harms attributable to the mere existence of child pornography and the compelling interest of the state to protect the welfare of the child.

The Court, in upholding the Ohio Supreme Court decision, would be in keeping with established precedent regarding the privacy interests of the child and possessor. As in any situation involving privacy interests, the Court is called upon to balance these interests. Clearly, the interests of the child

outweigh any interest an individual may have in possessing child pornography.

For these reasons, in addition to those urged by Appellee herein, the decision below should be affirmed.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this eighth day of September, 1989, to the following counsel of record:

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All parties required to be served have been served.

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